

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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WALTON KELLOGG,

Plaintiff,

v.

MICHAEL J. ASTRUE,  
Commissioner, Social Security  
Administration,

Defendant.  
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ORDER

11-cv-372-bbc

Plaintiff Walton Kellogg filed an appeal from defendant Commissioner of Social Security's denial of his application for Supplemental Security Income benefits. He sought either an award of benefits or a remand to the commissioner for a new hearing in compliance with the law and he asked for an award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, on the ground that the commissioner's action in this case was not substantially justified.

Plaintiff filed a motion for summary judgment on September 21, 2011. In an order entered on December 30, 2011, dkt. #15, I reversed defendant's denial of benefits and remanded the case under sentence four of 42 U.S.C. § 405(g) for further proceedings.

On March 29, 2011, plaintiff filed a motion and supporting brief, asking for attorney fees in the amount of \$10,564.50 under the Equal Access to Justice Act, 28 U.S.C. § 2412. He claimed that his counsel had worked 58.50 hours representing plaintiff at an hourly rate of \$177.50 for the first part of 2011 and \$180.00 in the later part of the year. He also sought costs in the amount of \$175.00. Plaintiff said that he is an individual whose net worth does not exceed \$2,000,000.

Defendant raised no objection to an award of fees, but disputed the number of hours claimed and the enhanced hourly rate plaintiff was seeking. He argued that the hourly rate sought by plaintiff was above the ceiling set in the Act, 28 U.S.C. § 2412(d)(2)(A), and the hours expended were more than necessary and customary for the work done.

Defendant's objection to the number of hours claimed by plaintiff for work on his case is based on his assertion that the case was a routine Social Security disability case "that essentially raised only two issues, neither of which was novel." Dft.'s Opp. Br., dkt. #21, at 2. He says that courts have generally recognized that a Social Security disability case typically takes 30-40 hours. Id. He asks the court to reduce the hours to be compensated to 40.

Plaintiff disagrees with defendant's characterization of the case as neither novel nor particularly complex, pointing out the anomaly of that assertion when defendant denied review of the Appeals Council's adverse determination of plaintiff's claim for benefits and

vigorously defended the case in this court, filing a 20-page brief in opposition to plaintiff's motion for summary judgment. Plaintiff also points out that counsel did not represent him in the administrative proceedings, so he was forced to learn the case from scratch. He notes that the brief was comprehensive and supported by a number of citations to applicable cases and regulations.

I agree with plaintiff that it is not enough for defendant to say that most Social Security cases take no more than 40 hours without saying exactly what was excessive or unnecessary in plaintiff's opening and reply briefs. Defendant has not shown that the hours plaintiff's counsel spent were unreasonable. My own review of the briefs shows them to be comprehensive, focused and well reasoned, without unnecessary arguments or discussion. Therefore, I will award fees to plaintiff on the basis of his work time of 58.50 hours on the case itself.

Plaintiff has asked for fees for the 4.1 hours he spent on his fee request. Defendant has not raised any objection to this request. Therefore, I will add the 4.1 hours to the 58.50 for which fees are sought, for a total of 62.6 hours.

As to the amount of the fee, defendant would like it kept to the statutory maximum amount of \$125 an hour. As I have noted in other cases, when Congress set this ceiling of \$125.00 an hour for legal work eligible for EAJA reimbursement, it left some leeway in the statute to award fees above this statutory ceiling. The court may set a higher rate if it

determines that doing so was justified by increases in the cost of living or by the limited availability of qualified attorneys for the proceedings involved. 28 U.S.C. § 2412(d)(2)(A); Mathews-Sheets v. Astrue, 653 F.3d 560, 562 (7th Cir. 2011). In this case, an increase in the statutory rate is justified on both grounds.

In affidavits attached to his briefs, plaintiff's counsel has made a compelling showing that an hourly rate of \$177.50 in 2011 (\$180 for the later part of the year) is warranted by the increases in the cost of living over the past 16 years since the \$125 ceiling was set, modest as they have been in recent years. Dkt. #18-1. As for available lawyers experienced in social security appeals, counsel has submitted an affidavit signed by plaintiff to the effect that he shopped for the best available attorney for the most reasonable fee before choosing his counsel. Dkt. #18-2. Although this affidavit might be boilerplate, there is no reason to think that it overstates the situation. I can take note from the experience in this court that it has been difficult in the past year for social security claimants to find counsel who are able to take their cases. This may be the result of an effort by the Social Security Administration to clear up the backlog of cases pending in this area, which means that more cases than usual are being heard, making it hard for many claimants to find counsel for their appeals. It may also be attributable to a difficult economy that makes it hard for even able bodied workers to find jobs, causing more people to file for benefits and to seek out lawyers to represent them as they do so.

ORDER

IT IS ORDERED that plaintiff Walton Kellogg's request under the Equal Access to Justice Act for an award of \$10,389.50 for fees for the work done on his case and \$175 for costs incurred, dkt. #17, and \$738.00 for briefing the fee award request, dkt. #26, for a total award of \$11,302.50, is GRANTED.

Entered this 1st day of June, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge